Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. **75-5091**

VERNON JUNIOR WOODS,
Petitioner

v.

STATE OF NORTH CAROLINA,
Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO REVIEW A DECISION OF THE SUPREME COURT OF NORTH CAROLINA (286 N.C. 612, 213, S.E. 2d 214 (1975))

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The Respondent prays that the Petitioner's PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES seeking a review of an Opinion of the North Carolina Supreme Court filed on April 14, 1975, be denied.

CITATIONS TO OPINION BELOW

The Petitioner was tried and convicted of first-degree murder on January 28, 1974, in the Superior Court of Catawba County, North Carolina. Notice of Appeal was given; however, the appeal was not perfected within the time allowed and the appellant petitioned for a Writ of Certiorari which was allowed by the North Carolina Supreme Court on May 8, 1974. The opinion of the North Carolina Supreme Court affirming the conviction was filed on April 14, 1975. State of North Carolina v. Vernon Junior Woods, 286 N.C. 612, 213 S.E.2d 214 (1975).

JURISDICTION

Petitioner invokes the jurisdiction of the Supreme Court of the United States pursuant to Title 28, United States Code, Section 1257(3). The decision of the North Carolina Supreme Court is a decision by the highest Court of the State of North Carolina in which a decision could be had. Petitioner contends that the decision of the North Carolina Supreme Court is repugnant to the United States Constitution (to wit, the 8th Amendment and the 14th Amendment).

QUESTIONS PRESENTED

1. DID THE TRIAL COURT COMMIT PREJUDICIAL ERROR IN DENYING DEFENDANT'S MOTION TO QUASH THE BILLS OF INDICTMENT CHARGING THE DEFENDANT WITH RAPE AND MURDER, AND FAILING TO GRANT DEFENDANT'S MOTIONS IN ARREST OF JUDGMENT ON THE BASIS OF THE ALLEGED UNCONSTITUTIONALITY OF THE DEATH PENALTY AS APPLICABLE TO THESE CASES?

2. DID THE TRIAL COURT COMMIT PREJUDICIAL ERROR IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE, THE VICTIM'S ENGAGEMENT RING AND WEDDING BAND, BASED UPON ALLEGED VIOLATION OF CONSTITUTIONAL RIGHTS ARRIVING OUT OF THE SEIZURE OF THE RINGS FROM DEFENDANT'S WIFE WITH HER ORAL CONSENT?

3. DID THE TRIAL COURT COMMIT PREJUDICIAL ERROR AND WAS THE DEFENDANT DENIED EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY VIRTUE OF PROSECUTORIAL DISCRETION IN CHOOSING CASES TO PROSECUTE FOR CAPITAL OFFENSES?

4. WAS THE DEFENDANT DENIED EQUAL PROTECTION UNDER THE LAW IN THAT AT THE TIME THE DEFENDANT WAS TRIED IN NORTH CAROLINA, THE ONLY PERMISSIBLE PUNISHMENT FOR MURDER OR RAPE WAS DEATH; AND IN THE MAJORITY OF OTHER STATES THROUGHOUT THE UNITED STATES, THE MAXIMUM CONSTITUTIONAL PUNISHMENT WAS LIFE IMPRISONMENT?

5. DID THE TRIAL COURT COMMIT PREJUDICIAL ERROR IN ALLOWING INTRODUCTION OF EVIDENCE OBTAINED AS A RESULT OF THE SEIZURE OF THE MOTOR VEHICLE OPERATED BY DEFENDANT AT THE TIME OF HIS BEING TAKEN INTO CUSTODY AND A SUBSEQUENT SEARCH PURSUANT TO A VALID SEARCH WARRANT?

TABLE OF AUTHORITIES

Citations

Carroll v. U.S., 267 U.S. 132, 153 (1925)

Chambers v. Maroney, 399 U.S. 42, 49 (1970)

Coolidge v. New Hampshire, 403 U.S. 443

Furman v. Georgia, 408 U.S. 238 (1972)

Hunters v. Martins Leasee, 14 U.S. 303, 325 (1816)

Fowler v. State of North Carolina, 285 N.C. 90, 203 S.E.2d 803 (1974)

McCollough v. Maryland, 17 U.S. 316 (1819)

McDonald v. United States, 335 U.S. 451, 456

Schneckloth v. Bustamonte, 412 U.S. 218 (1973)

State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974)

State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973)

U.S. v. Ellis, 461 2d 962, 966 (2d Cir. 1972)

U.S. v. Pate, 324 2d 934 Cert. denied; 377 U.S. 937, 12 L.Ed.2d 299, 84 S.Ct. 1341

U.S. v. VanLeewan, 397 U.S. 249, 253 (1970)

Weeks v. U.S., 232 U.S. 383, 397, 34 S.Ct. 341, 58 L.Ed. 652

Treatises, etc.

Blacks Law Dictionary, 4th Ed. (1968)

Corpus Juris Secundum, Volume 79, "Search and Seizures", Sec. 1, p. 775

Scott, Sovereign States and Suits, p. 55 (1925)

CONSTITUTIONAL PROVISIONS INVOLVED

(1) The Fourth Amendment to the United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the person or thing to be seized."

(2) The Fifth Amendment to the United States Constitution:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, excepting cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be held a public use without just compensation."

(3) The Eighth Amendment of the United States Constitution:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

(4) Section 1 of the Fourteenth Amendment to the United States Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, or citizens of the United States and of the State wherein they reside. Those states shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

STATEMENT OF CASE

This is a criminal action tried at the January 21, 1974, special session of the Superior Court of Catawba County before the Honorable Lacy Thornburg, Judge presiding, and a jury, on bills of indictment charging rape, kidnapping, and first-degree murder. The bills were consolidated for trial. The defendant

pleaded "not guilty" to each charge. The jury returned verdicts of "guilty as charged" as to each offense. From judgment the defendant appealed to the Supreme Court. Certiorari was allowed to permit late consideration of the case on appeal. The Supreme Court of North Carolina affirmed the decision of the trial court in an opinion filed on April 14, 1975. The opinion of the North Carolina Supreme Court is found in the official report of the case, State of North Carolina v. Vernon Junior Woods, 286 N.C. 612, 213, S.E.2d 214 (1975).

STATEMENT OF FACTS

Evidence offered by the State tended the following facts:

On August 11, 1973, shortly after 8:30 a.m., Mrs. Paula Gail Bowman Hollar left the home of her parents where she and her husband, Steven Hollar, were living. Though due at work at 9:00 a.m., she did not arrive at work that day; however, her car, a 1973 Pontiac was found in the parking lot where she usually parked, located adjacent to Boundary Street in Lenoir, North Carolina. Her nude, dead body was found by Charles Taylor in a small creek that crossed Old Mill Creek Road approximately one mile outside Lenoir, North Carolina, the following Sunday afternoon. The State Medical Examiner, Dr. John Daley, performed an autopsy on the body on August 13, 1973, at 2:30 p.m. The examination revealed that she had been dead between 24 and 72 hours. The examination of the victim's vagina revealed viable spermatozoa, blood and a three millimeter perforation of the peritoneum. The victim's clothing, some papers and her car keys were found on Saturday, the 11th, by Gerald Howell in a small creek near his home. After discovery of the body of the victim, an intensive investigation was begun and requests were made to the public for persons

having information to report it to the Lenoir Police Department. In the subsequent days, several witnesses reported events to the Lenoir Police Department.

The witness, James L. Kline, testified that as he was on his way to a local jewelry store at approximately 9:00 a.m. on August 11, 1973, he saw a young man and a young woman scuffling; that he saw the man's face and saw him push the woman into the back seat of a 1967 light green Chevrolet with a dark vinyl top in the parking lot next to Brother Pearson's Jewelry Store; that he didn't think much about the matter and didn't report it to anyone until he learned of the discovery of Mrs. Hollar's body. At the preliminary hearing witness Kline testified that when he viewed several police photographs at the Police Department, that he selected a picture of the defendant and more or less stated "that resembles him slightly". At the trial the witness Kline identified the witness as being the person he saw scuffling with the young girl in the parking lot on Saturday at approximately 9:00 a.m. Several other witnesses testified that they saw the defendant in the vicinity of downtown Lenoir on Saturday morning, the 11th, and one witness, Louise Wilcox, was allowed to testify that approximately 10:20 a.m. on August 11th, she saw a light green Chevrolet with two occupants turn off of Hibriten Lane onto Old Mill Creek Road.

The witness, A.R. Crisp, an attorney, was walking by the same parking lot on the morning of August 11, 1973, at 8:50 a.m. when he heard an automobile horn blow "toot" and saw in a light colored car a woman being held off the seat with her dress trembling and her body about parallel to the top of the automobile."

The witness, Violet Price, saw the defendant Woods on the morning of August 11, 1973, at 7:45 a.m. in a green Chevrolet with a vinyl top in the parking lot. Mrs. Price was in her car and as she parked her car, the defendant pulled his car beside her on the passenger side, got out of his car, came around to

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the driver side of Mrs. Price's car, opened her door, and said, "what's your name?" She was 8-1/2 months pregrant and frightened. She ordered the defendant away from her car. He said "I thought you were my wife."

The witness, Shirley Watson, was on her way walking from her car to the beauty shop when a green late model Chevrolet with a dark top pulled out and the driver seemed to stare at her as she walked across to the beauty shop. The driver was the defendant. The witness, Mrs. A. P. Lupes, left her home at 7:15 a.m., August 11, 1973, and stopped on the road to wait for a girl who worked for her mother. She noticed a light colored car with a male driver drive up beside her and blow the horn. She moved to permit him to enter a driveway. She next noticed that he had backed into a driveway and was watching her. When she looked his way he made a gesture for her to come to his car. She drove off. He followed her and at a stoplight, he got out of his car and came around to her car window on the driver's side and said "I am going to tell your husband."..."and your son". "You drive down to the A & P parking lot, I want to talk to you." At this time it was about 8:05 a.m., August 11, 1973. She identified the defendant as the man who had accosted her.

The defendant's mother-in-law, Mrs. Nellie Faye Wilson, testified that the defendant said that the two rings he (the defendant) gave to his wife on August 11, 1973, had been won by him in a poker game that morning. Mrs. Wilson identified one of the rings as being the same as State's Exhibit No. 7, the victim's wedding band.

The witness, Clarence Triplett, corroborated Mrs. Wilson's testimony as to the poker game statement, the presence of the two rings in the defendant's wife's possession, and further identified State's Exhibit No. 6 (the victim's engagement ring) as one of the rings that the defendant said he had won in a poker game.

Witness Wanda Coffey, defendant's sister-in-law corroborated the testimony of Mrs. Wilson and Clarence Triplett on identification of the rings.

The defendant was stopped by the Lenoir Police Department and brought in for questioning on this matter on Thursday, August 16th, at 9:45 a.m. The police saw him at his mother-in-law's home with his wife and brought him in for questioning. The vehicle which he was driving, a 1967 black over green Chevrolet, North Carolina license number BMW-552 was also brought in by another officer and locked, guarded, and sealed until the vehicle was searched pursuant to a search warrant issued by magistrate Goble. No arrest warrants or search warrants had been issued at the time, and no consent was given to the taking of the automobile. The defendant was held at the Lenoir Police Department until warrants were issued later that morning on charges of kidnapping, raping, and murdering Paula Gail Bowman Hollar. At 1:45 p.m. the same day a search warrant was issued for the 1967 Chevrolet which had been in the possession of the police since the seizure that morning at about 9:45 a.m.

At approximately 7:00 p.m. the same day the defendant's wife came to visit him at the Caldwell County jail. While there, Tripplett and SBI Agent Charles Whitman subsequently arrived and asked the defendant's wife about the rings. After her mother, Mrs. Wilson, told her to give the rings to the officers, she agreed to accompany them to her trailer where she gave them two rings given to her by her husband. The rings were subsequently shown to have been the engagement ring and wedding band worn by the victim on the morning of her disappearance.

The State offered expert testimony which tended to show that certain fibers which were found in the 1967 Chevrolet automobile matched fibers which were in the dress worn by the

the victim on August 11, 1973. A portion of an identification card which was found in the 1967 Chevrolet was shown to match a larger portion of the identification card which was found in the victim's wallet in a creek where her clothing were found.

The defendant offered evidence which showed that on August 11, 1973, the defendant was at his sister's house south of Lenoir, North Carolina, from 7:00 a.m. until 7:40 a.m. and again at about 10:00 a.m.

On motion of the defendant these cases were removed from Caldwell County to Catawba County. A special one week term of Catawba Superior Court was called to hear these cases and the three charges against the defendant were consolidated for trial over his objection.

The District Attorney, Donald E. Green, testified prior to jury selection with regard to his handling of capital cases for the year 1973. Following this, the jury was selected by the State and Defendant. After the State had exhausted nine peremptory challenges, the defendant objected to a tenth peremptory challenge when it was exercised by the State. At that time the presiding judge ruled that the State would have twenty-two peremptory challenges and the defendant would have thirty-four peremptory challenges.

The jury returned its verdict on January 28, 1974, finding the defendant guilty of kidnapping, rape and murder. The judgment of the court was that the defendant be imprisoned for life on the conviction of kidnapping, be given the death penalty for the conviction of rape, and be given the death penalty for the conviction of first-degree murder. From these judgments, the defendant gave notice of appeal to the North Carolina Supreme Court. The Court found the defendant to be indigent and unable to employ counsel to represent him on the appeal, and appointed John McMurry and Bruce W. Vanderbloemen to represent him on his appeal to the Supreme Court of North Carolina.

During the course of the trial the defendant made 743 objections according to stipulations in the case on appeal.

All of the questions presented to this court for review were passed on by the North Carolina Supreme Court and each assignment of error was found to be without merit. Attached as an appendix is the official report of the North Carolina Supreme Court in the case of State of North Carolina v. Vernon Junior Woods, 286 N.C. 612, 213 S.E.2d 214 (1975).

1. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN DENYING DEFENDANT'S MOTION TO QUASH THE BILLS OF INDICTMENT CHARGING THE DEFENDANT WITH RAPE AND MURDER, AND FAILING TO GRANT DEFENDANT'S MOTIONS IN ARREST OF JUDGMENT ON THE BASIS OF THE ALLEGED UNCONSTITUTIONALITY OF THE DEATH PENALTY AS APPLICABLE TO THESE CASES.

In his argument to support his Petition for Writ of Certiorari, petitioner contends that the ground for allowance of this writ is similar, if not identical, to that raised in the Petition for Writ of Certiorari filed by Jesse Fowler (see Fowler v. State of North Carolina, 285 N.C. 90, 203 S.E.2d 803 (1974)); which petition was granted by the United States Supreme Court. Petitioner asserts that the constitutionally invalid element in this, and the Fowler case is the discretion that a judge or jury might exercise in deciding whether a defendant would receive a prison sentence, or the death penalty. However, the respondents disagree; the petition for Writ of Certiorari in the Fowler case was granted for the purpose of reviewing the constitutionality of the death penalty under the analysis of whether a sentence of death can be considered a cruel and unusual punishment.

Respondents wish to point out that the facts of the Fowler case are vastly different from the instant case. Premeditation and deliberation were the basis for the first degree murder case in Fowler. Then too, neither the felony murder rule nor offenses of kidnapping or rape were involved in the Fowler case as they are in the case at bar.

Respondents assert that the issue of capital punishment as a possible violation of the Fourteenth and Eighth Amendments,

the constitutional prohibition against "cruel and unusual punishment", has been extensively briefed and argued before this honorable court and the North Carolina Supreme Court. There have been extensive and thorough arguments made in persuasive terms on each side of the issue. Reargument in Fowler v. N.C. is tentatively set for October, 1975. The fact remains, however, that under the controlling case law of North Carolina, imposition of capital punishment for first degree murder committed in the perpetration of murder, kidnapping, and rape is not objectionable to the North Carolina Constitution. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973); State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974).

The respondent asserts that judicial notice be taken of the plight of this country and its struggle against the soaring and staggering crime rate. Numerous studies yield ever increasing statistics of the crimes committed in this country daily; vicious homicidal crimes in particular. The public outcry for swift and effective sentences (to curb and deter this crime wave) is heard throughout the land.

Justice Lake in his opinion of the case of State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974), spoke to this proposition directly:

> "Whether the imposition of the death penalty in such a case will be futile in deterring others from like acts is, necessarily, a matter of opinion, upon which reasonable minds may and do differ. The steadily rising tide of crimes of the most serious nature, throughout the nation, has occurred in an era of unprecedented permissiveness in our society and of emphasis on sympathy for the accused rather than for his victim and those endangered by him. This is ample basis for reasonable men to conclude that some punishment of exceptionally vicious crimes, other than imprisonment coupled with carefully organized programs for rehabilitation designed to assure the prisoner that he has the sympathy of society, is necessary to bring about the turning of the tide."

The respondent respectfully urges that the Court declare the death penalty constitutional and thereby dismiss this Petition for Writ of Certiorari.

2. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE, THE VICTIM'S ENGAGEMENT RING AND WEDDING BAND, BASED UPON ALLEGED VIOLATIONS OF CONSTITUTIONAL RIGHTS ARISING OUT OF THE SEIZURE OF THE RINGS FROM DEFENDANT'S WIFE WITH HER ORAL CONSENT.

The Fourth Amentment to the United States Constitution provides:

> "The right of the people to be secure in their homes, houses, papers, effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The State of North Carolina does not dispute the protections guaranteed to citizens against unreasonable searches and seizures guaranteed to them by the Fourth Amendment to the Constitution of the United States. However, in the case at bar, there was no search. There was a request for evidence by two law enforcement officers who were unsuccessful in having their request granted until the defendant's wife's mother urged her to "tell him about the rings". The defendant's wife was also urged by her mother to "tell him where those rings are". Law enforcement urging or persuasion was not successful. The key to the voluntary surrender was a mother's advice and instructions to her daughter. If there was pressure, incentive and persuasion which caused the defendant's wife to voluntarily surrender the rings, it was not the efforts of the officers but the force and persuasion of a mother's advice to her daughter.

The property surrendered by Mrs. Woods was in her possession and had been given to her by her husband on the 11th of August after he said he had won the rings in a poker game. As between the husband (defendant) and Mrs. Woods, the rings were hers since they had been given to her and were in her possession in her pants pocket. If she was consenting to a search (and the State does not agree that there ever was a search),

her consent was for seizure of the rings which were in her possession in her pants pocket and which had been given to her by the defendant and were indeed considered at that time to be her property. There is evidence in the record on appeal to the North Carolina Supreme Court that the rings were considered Mrs. Woods' as they were referred to as "Brenda's new rings".

Further evidence in support of a consent seizure is the fact that only two officers talked to Mrs. Woods at the police station, and her mother was present part of this time. She was upset but agreed to go get the rings in question after her mother (not a police officer) urged her to do so. She went to her trailer home, accompanied by her mother and officers. After obtaining a key she unlocked the door and led the two officers and her mother to a bedroom where she picked up a pair of ladies blue jeans pants, the kind that zip up the left side, and extracted from the right side pocket of her blue jeans the two rings in question. She gave the rings to the officers who departed. No search or further inquiry was made at the trailer. No inspection, inquiry, or search of any type was made by accompanying officers. Officers were inside the trailer less than two minutes.

The facts of the case at bar point out that the defendant's wife was asked about the rings and was persuaded <u>by her mother</u> to give the rings to the officers. She thereafter took her mother and officers to her trailer home where she took the rings from the pocket of a pair of her pants. She gave the rings to the officers. There was no search of the house trailer. There had been no need for a search.

The respondent asserts that the constitutional prohibition against unreasonable searches and seizures extends only to <u>unreasonable</u> activities. Whether a search is unreasonable is determined by the Court on the facts of each case and on the

totality of the circumstances surrounding the search and seizure. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). It is also well settled that the constitutional guarantee against unreasonable searches and seizures does not prohibit a seizure of evidence without a warrant when no search is required. United States v. Pate, 324 2d 934, Cert. denied, 377 U.S. 937, 12 L.Ed.2d 299, 84 S.Ct. 1341.

The term "search" as defined in Corpus Juris Secundum is:

> "The term search as applied to searches and seizures, is an examination of a man's house or other buildings or premises, or of a person, with a view to the discovery of contraband or illicit or stolen property, or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offense with which he is charged. As used in this connection the term implies some exploratory investigation, or an invasion and quest, a looking for or seeking out. The quest may be secret, intrusive, or accomplished by force, and it has been held that a search implies some sort of force, either actual or constructive, much or little. A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way. While it has been said that ordinarily searching is a function of sight, it is generally held that the mere looking for that which is open to view is not "search"." 79 C.J.S., Searches and Seizures, Section 1, p.775.

The State asserts that when evidence is delivered to a police officer upon request and without police compulsion and coercion, there is no search within the constitutional prohibition against unreasonable searches and seizures.

It was held in Weeks v. United States, 232 U.S. 383, 397, 34 S.Ct. 341, 58 L.Ed. 652; and U.S. ex rel. Stacy v. Pate, 324 F.2d 934, 935 (7th Circuit 1965) that "a search ordinarily implies a quest by an officer of the law, a prying into hidden places for that which is concealed. A seizure contemplates forcible dispossession of the owner". The State asserts that there was no forcible dispossession of the rings from the defendant's wife. The defendant's wife voluntarily agreed to get the rings and give them to the police officers. She did this on the advice of her mother and not at the request of the police officer. There was no undue influence upon defendant's

wife by police officers. The officers did not pry into hidden places within the trailer of the defendant and did not forcibly take the rings from the defendant's wife. In fact, the rings were voluntarily turned over to the police officers who then immediately left the trailer without searching any other part of the trailer for any type of evidence. It is our contention that when evidence is delivered to a police officer upon request and without compulsion and coercion, there is no search within the constitutional prohibition against unreasonable searches and seizures.

Appellants have made reference to the "totality of the circumstances" test for determining voluntariness of consent. The record is clear that though Mrs. Woods was crying, she was not persuaded by the law enforcement officers' pleas and requests, and agreed to turn the rings over only after her mother entered the conversation and persuaded her to do so. The respondents contend that the totality of the circumstances show by clear and convincing evidence, indeed, beyond a reasonable doubt, that the decisive factor was the defendant's wife's mother who intervened and advised her daughter to turn over the rings. No State persuasion had been effective theretofore.

The questions of the occurrence of the search, whether any search was unreasonable, whether any seizure was pursuant to a voluntary, knowing and understanding consent were the subjects of several voir dire inquiries conducted by the judge in the State trial. There are findings of fact and conclusions of law which are supported by the evidence that the search was not unreasonable and was pursuant to a voluntary, knowing and understanding consent.

The respondent's argument and answer to the Petitioner take three major forms: (1) there was no search within the constitutionally protected sense; (2) there was no law enforce-

ment coercion of defendant's wife who voluntarily gave up the rings since the determinative factor in her decision was her mother's advice and persuasion; and (3) the property was not the defendant's but was his wife's since he, according to the evidence, had given and delivered them to her three days before she voluntarily turned them over to the police officers.

The Respondent contends that there was no error arising out of the voluntary surrender of the rings by the defendant's wife and that Petitioner's Writ of Certiorari on this basis is without merit as there has been no violation of the petitioner's constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution. Petitioner is thus without standing to bring this Petition for a Writ of Certiorari.

3. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR NOR WAS THE DEFENDANT DENIED EQUAL PROTECTION UNDER THE LAWS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY VIRTUE OF PROSECUTORIAL DISCRETION IN CHOOSING CASES TO PROSECUTE FOR CAPITAL OFFENSES.

Petitioner contends, in his Petition for Writ of Certiorari to the United States Supreme Court, that the discretion used by the district attorney in deciding which cases to prosecute and which to accept pleas to lesser included offenses is unconstitutional according to the United States Supreme Court Decision of Furman v. Georgia, 408 U.S. 238 (1972). Petitioner is attempting to convice the court that the Supreme Court ruled that the discretionary power of the prosecution is unconstitutional as a result of the Furman v. Georgia holding. However, the respondents feel that the petitioner is in error and that his argument is without merit because the holding in Furman v. Georgia pertains to the discretionary power of the judge or jury in sentencing a man to death and not to the decision whether or

not to prosecute that individual for a crime committed against society.

The thrust of the petitioner's argument is that the discretion exercised by a prosecutor is equivalent to the discretion that a judge or jury might exercise in deciding whether a defendant will receive a prison sentence or instead receive a death penalty and is therefore unconstitutional under the holding Furman v. Georgia. In contrasting the case at bar to the case of Furman v. Georgia, the respondents wish to point out that in the case at bar there was no discretion on the part of the judge or the jury as to whether or not to sentence the defendant to death. In the most recent capital punishment discussion by the North Carolina Supreme Court, Justice Branch speaking for the Court noted:

> "Finally, defendant contends that the death penalty constitutes cruel and unusual punishment and violation of the Eighth Amendment to the United States Constitution.
>
> This Court has declared that upon conviction any person who commits the crime of burglary in the first degree, first degree murder, arson or rape after 18 January 1973 shall suffer the penalty of death. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19. We fully consider the constitutionality of the death sentence in light of the Eighth and Fourteenth Amendments to the United States Constitution in the case of State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721, and there reaffirm the holding of Waddell."

It is obvious from the previous quote then, that the judge and jury has no discretion on how to sentence a man convicted of a capital crime in North Carolina after January 18, 1973. Therefore, the type of discretion complained of in the case of Furman v. Georgia was not present in the case at bar. On the contrary, there was no discretion on the part of the judge or the jury as to the sentence of the convicted defendant.

Petitioner further complains that the discretion on the part of the District Attorney as to whether or not to prosecute a defendant for a capital crime or for a lesser included offense is an unconstitutional violation of the Fourteenth Amendment. To this contention, the respondents disagree totally.

The respondents assert that the decision on the part of the district attorney to prosecute a capital offense rather than to accept a lesser plea or to prosecute for some less serious offense does not necessarily guarantee that the defendant will be sentenced to the death penalty. The right to a trial by jury and also the right to be presumed innocent until proven guilty are rights which totally protect defendants from unwarranted and discretionary sentences. Once a district attorney decides to prosecute a case he has made his decision on the facts of the case as they exist before him, the evidence that he is aware of and the likelihood of a conviction of a crime that has been committed against an individual and society. If the evidence warrants a conviction of a capital offense in the mind of the district attorney, it is his duty to charge the capital offense and try the defendant for his life. If a district attorney feels that the evidence does not warrant a conviction or if the district attorney is aware of some fatal error or weakness in the State's case which would prevent a conviction of a capital offense, it is his duty to accept a plea or to try the defendant for a lesser included offense of the crime charged in order that justice of some nature might be achieved. To suggest as does the petitioner, that the district attorneys of our nation seek convictions of lesser included offenses instead of seeking convictions on capital charges on the basis of a whim or pure discretion is a patent absurdity; unjust to the integrity, skill and sense of duty of attorneys who have held and who do hold the high office of district attorney or solicitor within the states of this union.

In the case of State v. Jarrette, supra, Justice Lake made an in depth study as to whether the discretion used by the district attorney is unconstitutional. Quoting Justice Lake:

> "The purpose of vesting the power of judgment in an official is to enable him to make different decisions in different cases in light of what he determines to be materially different from factual situations. All governmental actions are based on this delegation of responsibility. The Fourteenth Amendment to the Constitution of the United States

> does not require a state, in the enforcement of its criminal laws, so to hedge its prosecuting attorney about with "guidelines" that he becomes a mere automaton acting on the impulse of a computor and treating all persons accused of criminal conduct exactly alike. From the foundation of the country to the present date, the discretion, now complained of by the amicus curiae has been vested in prosecuting attorneys throughout the country. Without it, the greatest injustices would necessarily be inflicted upon the innocent persons accused of crimes.
>
> The suggestion by the amicus curiae that the death penalty is unconstitutional because in many cases in which the prosecuting attorney seeks the death penalty the jury acquits the defendant altogether or convict him of a lesser, included offense, has, if possible, even less plausibility. Article 1, Section 24 of the Constitution of North Carolina requires a trial by jury in all such cases. The Sixth Amendment to the Constitution of the United States contains a like provision. Obviously, the possibility of different verdicts by different juries in different cases upon different evidence was not believed by the framers of these constitutional provisions to be a sound reason for denying a state the power to impose an otherwise lawful penalty upon one found guilty by the jury which tried him, he having had a fair trial in accordance with the applicable law."

The respondents respectfully assert that the philosophy of Dr. Lake's opinion has been given judicial approval by this high court and that the petitioner's contention that the death penalty is discretionary and the prosecution should be dismissed are without merit.

The petitioner also asserts in his argument that the death penalty is discretionary in the contention that the Governor has the discretion to commute death sentences to life imprisonment and therefore this violates the holding of Furman v. Georgia, supra. Petitioner contends that defendants who are indigent or who have no political ties are at a distinct disadvantage and are decidedly discriminated against. Justice Lake in his opinion of the case of State v. Jarrette, supra, spoke directly to this issue.

> "It is quite true that Article 3, Section 5 (paragraph 6), of the Constitution of North Carolina gives to the Governor of this state the authority to commute a death sentence imposed upon any defendant, or to grant to such defendant, an absolute pardon, and to refuse to disturb such sentence imposed upon a different defendant. Article 2, Section 2 of the Constitution of the United States con-

> fers a like power upon the president. So far as we have been able to determine a like power is vested in the Governor, or some other official of the executive department, in each of our states. This power has existed and has been exercised repeatedly by the governors of every state and by the President of the United States from the birth of our country. If its existence and frequent exercise makes the imposition of the death penalty unconstitutional per se, the nine justices of the Supreme Court of the United States wasted a great deal of thought and much paper in Furman v. Georgia, supra, none of them so suggested in that case.
>
> We reject categorically the contention of amicus curiae that the inevitable result of the North Carolina system of commutation is that an arbitrarily select in number of those convicted of like crimes will be put to death. The governor exercises his judgment after investigation of the record of the trial and other circumstances, including subsequently discovered evidence. This Court reviews the rulings of the trial judge. The governor reviews the decision of the jury, which we may not do. The exercise by one governor of this judgment, resulting in the commutation of the sentence of one man convicted of murder or rape and the refusal to commute the sentence of another convicted of such a crime, cannot be called "freakish" or "arbitrary" merely because another governor might, theoretically, have reached opposite conclusions."

The respondents assert that the equal protection clause of the Fourteenth Amendment makes no distinction between sentences for death and sentences to imprisonment. The due process clause of that amendment protects liberty as well as life. The prosecutorial discretion of the solicitor or district attorney and of the governor extends also to non-capital cases. Without a doubt, if the existence of these discretionary powers makes the imposition of the death penalty unconstitutional, it should logically also make unconstitutional all prison terms, however long or short. It is urged by the respondents that this is not the kind of discretion which the Supreme Court of the United States held impermissible in Furman v. Georgia, supra.

Therefore, we respectfully urge the Court to dismiss the argument of petitioners that the discretionary power of the prosecutor in deciding which cases to prosecute for capital

offenses denies the defendant equal protection of the laws as guaranteed by the Fourteenth Amendment of the United States Constitution, as being without merit.

4. THE DEFENDANT WAS NOT DENIED EQUAL PROTECTION UNDER THE LAW IN THAT AT THE TIME THE DEFENDANT WAS TRIED IN NORTH CAROLINA, THE ONLY PERMISSIBLE PUNISHMENT FOR MURDER OR RAPE WAS DEATH: AND IN THE MAJORITY OF OTHER STATES THROUGHOUT THE UNITED STATES, THE MAXIMUM CONSTITUTIONAL PUNISHMENT WAS LIFE IMPRISONMENT.

The petitioner contends that he was denied equal protection under the law as guaranteed by the Fourteenth Amendment of the United States Constitution because at the time of his conviction the penalty for rape and murder in this State was death, and in other states in the union the maximum penalty would be life imprisonment. He suggests in his argument that the maximum penalty for rape and murder in North Carolina must be the same maximum penalty as in any other state within the union. To this the respondent totally disagrees and asserts that the determination of sentences and punishments for state crimes are within the discretion of the states as reserved to them by the Tenth Amendment of the United States Constitution.

Under the regime of constitutional law as established in the United States, the separation of powers and checks and balances as a means to maintain liberty goes further than separating only the three branches of the Federal Government. The constitutional scheme places heavy reliance upon the independence and sovereignty of the states. It has been stated in Scotts book, Sovereign States and Suits, (1925) p.55 that:

> "Without laboring the matter further, it is abundantly clear that the states after the Declaration of 1776 were free, sovereign and independent, and they remain so, in the sense of international law, until they change that status by their subsequent, and, as we shall see, voluntary act."

When the states changed their status with respect to the new government of the United States, they did not surrender their sovereignty or become mere "quasi sovereigns". The states granted certain of their powers to the United States of America, and as Hamilton stated in the Federalist (45), "The powers delegated by the proposed Constitution to the Federal Government are few and defined."

The proposition that the Federal Government is one of limited powers is so fundamental and so apparent that it needs little elaboration. Chief Justice Marshall stated in McCollough v. Maryland, 17 U.S. 316 (1819), that:

> "We admit, as all must admit, that the powers of the (Federal) government are limited, and that its limits are not to be transcended."

Then too, Justice Story, in Hunter v. Martin's Lessee, 14 U.S. 303, 325 (1816), said:

> "The government, then of the United States, can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication."

It is obvious then, that the federal government has no powers beyond those delegated to it in the constitution. That is, it has only limited sovereignty.

That being so, the remainder of the sovereign power lies "within the people" and is to be exercised through their state governments.

It is the contention of the respondent that two of the incidents of those sovereign powers reserved to the states is the power to define criminal conduct and provide for the punishment therefore within the state's territory, limited only by the prohibition against cruel and unusual punishment contained in the Eighth Amendment. The respondent asserts that the Tenth Amendment protects these sovereign rights of the State in the same way that it protects any other constitutionally protected

right whether it be individual or state.

This court, even if it were to desire to do so, can no more lawfully abrogate a constitutionally guaranteed right of the State than it can the right of an individual. Thus, "contemporary standards of society" can not be a proper basis for abolishing the death penalty under the Eight Amendment any more than the "contemporary standards" of the McCarthy era that abolished the rights guaranteed to the individual under the Fifth Amendment to the Constitution.

Only by the exercise of the sovereign power of the state through its General Assembly may the punishment for rape, or murder be lessened in North Carolina.

Therefore what the maximum penalty is for murder or rape in another state has no bearing on the maximum penalty for murder or rape in the State of North Carolina, because the right to sentence and punish is a sovereign right guaranteed to this state by the Tenth Amendment to the United States Constitution. It is within the discretion of the North Carolina General Assembly as to what the maximum penalties for sentencing and punishment of criminal offenders shall be. The maximum penalty in North Carolina for the commission of the crime of first degree rape or first degree murder is death and has been determined to be so by the State Legislature. Consequently, the defendant was not denied due process of the law as the governing body of the state within which the crime was committed is the proper forum in which to determine penalties for murder and rape. The maximum criminal punishments in other states is to be determined by their state legislatures in accordance with the beliefs of the people who live in that state.

Petitioners argument is without merit and should be dismissed as the North Carolina General Assembly has properly and constitutionally determined what the penalty of capital offenses should be.

5. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN ALLOWING INTRODUCTION OF EVIDENCE OBTAINED AS A RESULT OF THE SEIZURE OF THE MOTOR VEHICLE OPERATED BY THE DEFENDANT AT THE TIME OF HIS BEING TAKEN INTO CUSTODY AND A SUBSEQUENT SEARCH PURSUANT TO A VALID SEARCH WARRANT.

The petitioner asserts that the Fourth Amendment as applied to the States by the Fourteenth Amendment guarantees certain rights to persons to be secure from unreasonable searches and seizures. He asserts the invalidity of the seizure of the vehicle in which defendant was found when invited down to Police Headquarters and the subsequent search of that vehicle pursuant to a warrant. Respondents feel that this contention is without merit since there is evidence in the record which clearly establishes the steadfast faith and loyalty of the defendant's wife to her husband and her continuing belief in his innocence. This steadfast faith and loyalty of the defendant's wife gave rise to legitimate law enforcement fears that she might destroy evidence to protect her husband and assist in his defense. In fact, there is some evidence that a third ring of the deceased was to have been in the possession of the defendant's wife but could not be found by law enforcement officers. (However, they later obtained information that Mrs. Woods had thrown the ring into a creek.) Faced with this exigency, the police officers took the necessary steps to seize and impound the Woods' vehicle in order to safeguard and protect any evidence therein against tampering and destruction until such time as a valid search warrant could be applied for, issued by a magistrate, served upon the owners of the car, and the search conducted by experts of the State Bureau of Investigation.

Petitioner attacks the seizure of the automobile on two bases: First, that his going with the police officer at the officer's request constituted an arrest without a warrant. Such an arrest was illegal, they contend, and therefore any seizures pursuant thereto are illegal and inadmissible. Second, they contend that if the petitioner was not arrested when he

accompanied the police officers to headquarters, then the seizure of the vehicle without a search warrant was illegal since there was no lawful arrest and no consent to the seizure.

The State respectfully urges and contends that there was no search without a warrant and no violation of any constitutional safeguards. Indeed, there was no search conducted until a valid search warrant was obtained. The Exhibits objected to were seized pursuant to a valid search warrant issued by the magistrate.

Whether the request to accompany the officers and defendant's compliance constituted an arrest is unclear. "Arrest" normally requires more than a citizen being asked to voluntarily accompany a police officer to the police station to answer questions and a citizen without complaint accompanying the officer--all without any sort of formal declaration by the officers that the petitioner is "under ar[illegible]" or any loss of liberty by the defendant.

"The right to search and the validity of a seizure are not dependent on the right to arrest". Chambers v. Maroney, 399 U.S. 42, 49 (1970). In any event, it is clear from the evidence in the record that there was no search of the vehicle before the search warrant was issued, merely a safeguarding of evidence, though the automobile was in fact seized before there was a search warrant issued.

The thrust of petitioner's contention appears to be that the seizure was unreasonable and without a warrant and that any evidence ultimately obtained thereby ought to be inadmissible.

The State's position is strongly to the contrary. If the petitioner was arrested at the time he accompanied the police officer, (and the State does not urge that he was in fact arrested at that point in time), the arrest was legitimate and

appropriate in that it was based on probable cause to believe that appellant had committed a felony (murder, kidnapping, and rape) and was likely to evade arrest if not immediately taken into custody. The probable cause to believe that he committed the felonies and would evade arrest was based upon information from witnesses who had been accosted by the defendant in his car on the morning of the attack and witnesses who saw the car or the defendant in the parking lot on the morning in question.

Generally searches and seizures without a search warrant are per se unreasonable in the absence of some exceptions to the rule, i.e. consent to search, plain view doctrine, or automobile searches when there are exigent circumstances.

In Carroll v. United States, 267 U.S. 132, 153 (1925), the Court recognized that there was a "necessary difference between a search of a store, a dwelling house, or other structure and a search of a ship, motor boat, wagon or automobile...where it is not practical to serve a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."

"The underlying rationale of the "automobile exception" is that exigent circumstances justify the warrantless search of an automobile, when there is probable cause, where "the opportunity to be searched is fleeting...". Chambers v. Maroney, 399 U.S. 42, 51." U.S. v. Ellis, 461 F. 2d 962, 966 (2d Cir. 1972).

In Coolidge v. New Hampshire, 403 U.S. 443, the Court discussed its rule that warrantless searches are per se unreasonable except in certain cases. "The exceptions are 'jealously and carefully drawn' and there must be a 'showing by those who seek the exemption...that the exigencies of the situation made that course imperative.' Coolidge v. New Hampshire, supra, 455. Citing McDonald v. U.S. 335 U.S. 451, 456."

In Coolidge the Court seemed to base its holding upon their conclusion that there were no real or genuine exigencies under the facts in that case.

One is compelled to reexamine the term "exigencies".

"Exigency" is defined variously but in this context the most appropriate definition seems to be:

> "Something arising out of circumstances calling for immediate action or remedy, or where something helpful needs to be done at once, yet not so pressing as an emergency." Black's Law Dictionary, 4th Ed. (1968).

It is clear that in this context the "exigency in question arises from the dangers...of destruction of evidence within the reach of the arrestee" or one closely aligned with his interest such as a wife. Coolidge v. New Hampshire, supra, 478 (emphasis added).

In the instant case the exigency presented to the officers who seized the automobile were the two dangers -- one, that if the automobile was not seized and impounded, the wife of the defendant would likely attempt to destroy or make unuseable any evidence therein just as she had disposed of one of the victim's three rings given to her by her husband. The second exigency was that unless impounded, seized, sealed and safeguarded immediately upon the taking of defendant to police headquarters, any evidence in the car could be tainted and considered unreliable at least in the minds of the jury and perhaps made inadmissible because of intervening uncontrolled access to the car by persons other than the defendant.

Contrary to the facts in Coolidge, supra, the defendant's wife was not away from home or out of town but was not only readily available but, out of misguided loyalty to her husband, was not adverse to disposing of evidence against him. Under circumstances such as this, the impounding of the automobile was not unreasonable and was probably the most prudent course of action for law enforcement officers. U.S. v. Van Lewan, 397 U.S. 249, 253 (1970).

In summary the State contends that it has shown on voir dire examination and by the findings of fact of the trial court that the search of the vehicle was not unreasonable and was done pursuant to a valid search warrant. The arrest was accomplished pursuant to valid arrest warrants properly charging the defendant and was without legal flaw. The danger of loss of accountability of evidence also presented the police with the necessity for safeguarding the car and its contents.

The respondent strongly and earnestly contends that the seizure complained of by petitioner was not unreasonable and was in fact the most reasonable course for police to pursue. The respondent urges that no error was committed and that the evidence seized therein was properly admitted.

CONCLUSION

The respondent respectfully urges this honorable court to dismiss this petition for Writ of Certiorari as the decision of the North Carolina Supreme Court is not repugnant to the Eighth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted this 8th day of August, 1975.

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IN THE

SUPREME COURT OF THE

UNITED STATES OF AMERICA

VERNON JUNIOR WOODS	)	
	)	
v.	)	Proof of Service
	)	
STATE OF NORTH CAROLINA	)	

I, T. Lawrence Pollard, Associate Attorney General, North Carolina Department of Justice, certify that I have this day served a copy of the attached Answer to Petition for Writ of Certiorari upon the attorney for the petitioner herein, Vernon Junior Woods, by placing same in the United States mail, postage prepaid, addressed to:

Bruce W. Vanderbloemen
Attorney at Law
Professional Mall Building
Lenoir, North Carolina

This the 8th day of August, 1975.

T. Lawrence Pollard

T. Lawrence Pollard
Associate Attorney General

No. 13

(Filed 14 April 1975)

MOORE, Justice.

[1] Defendant first assigns as error the action of the trial court in allowing the State to challenge peremptorily without cause more than nine jurors. It was stipulated that the State peremptorily excused eleven jurors and the record shows that the defendant peremptorily excused thirteen. The trial court ruled that the State had twenty-two peremptory challenges and that the defendant had thirty-four.

Defendant was charged with two capital crimes and one non-capital.

G.S. 9-21 in part provides:

"(a) In all capital cases each defendant may challenge peremptorily without cause 14 jurors and no more. In all other criminal cases each defendant may challenge peremtorily six jurors without cause and no more. . . .

"(b) In all capital cases the State may challenge peremptorily without cause nine jurors for each defendant and no more. In all other criminal cases the State may challenge peremptorily without cause four jurors for each defendant and no more. . . ."

The trial judge allowed the State nine peremptory challenges in each capital case and four in the kidnapping case, for a total of twenty-two. Defendant was allowed fourteen in each capital case and six in the kidnapping case, for a total of thirty-four. This was error. Under the express provisions of the statute in all capital cases the defendant may challenge fourteen jurors and the State may challenge nine jurors *"and no more."* (Emphasis added.) *See State v. Alridge*, 206 N.C. 850, 175 S.E. 191 (1934). In the present case, however, we think this error is harmless.

It is well established that the system by which juries are selected does not include the right of any party to select certain jurors but to permit parties to protect themselves against prejudice by allowing them to exclude unacceptable jurors. Defendant has no vested right to a particular juror. *State v. Honeycutt*, 285 N.C. 174, 203 S.E. 2d 844 (1974); *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969). The right of peremptory challenge is not a right to select but to exclude. *State v. Allred*, 275 N.C. 554, 169 S.E. 2d 893 (1969); *State v. Spencer*, 192 N.C. 515, 65 S.E. 84 (1926). Defendant did not exhaust the fourteen peremptory challenges allowed by the statute. He was not in any respect denied his right to exclude unacceptable jurors unacceptable to him.

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As was said by Chief Justice Stacy in *State v. Koontz*, 227 N.C. 552, 555, 43 S.E. 2d 77, 80 (1947):

> " . . . To present an exception on rulings to challenges to the polls, the appellant is required to exhaust his peremptory challenges and then undertake to challenge another juror. *Oliphant v. R. R.*, 171 N.C., 303, 88 S.E., 425. The court's action in the matter must be hurtful and its effect unavoidable before it will be held to vitiate the trial. *S. v. Cockman*, 60 N.C., 484; *S. v. Benton*, 19 N.C., 196.
>
> "The trial court was at pains to see that every opportunity was afforded for the selection of a fair and impartial jury. The defendants would be entitled to no more on a new trial, and this they have already had. *S. v. Levy*, 187 N.C., 581, 122 S.E., 386; *S. v. Sultan*, 142 N.C., 569, 54 S.E., 841; *S. v. English*, 164 N.C., 497, 80 S.E., 72; *S. v. Belvin*, 142 N.C., 695, 55 S.E., 797. Their right is not to select but to reject jurors. Having been tried by twelve jurors who were unobjectionable to them, the defendants have no valid ground to urge that they have been prejudiced by the composition of the jury. *S. v. Pritchett*, 106 N.C., 667, 11 S.E., 357; *S. v. Hensley*, 94 N.C., 1021."

Although it was error for the trial court to allow the State more than nine peremptory challenges and to allow the defendant more than fourteen, we hold that this error was harmless and not so prejudicial as to require a new trial. *See* 3 Strong, N. C. Index 2d, Criminal Law § 167, p. 126, and cases cited therein.

This assignment is overruled.

[2] Defendant next assigns as error the denial of his motion to suppress the evidence and resulting into evidence State's Exhibits Nos. 6 and 7, an engagement ring and a wedding band. He contends that his constitutional rights under the Fourth and Fourteenth Amendments to the Constitution of the United States were violated in that this evidence obtained by the officers was without the authorization of a valid search warrant and that evidence obtained in such a manner is incompetent under G.S. 15-27, the federal exclusionary rule, and federal and state decisions dealing with unreasonable searches conducted by officers of the courts.

To support this position, defendant cites *State v. Hall*, 264 N.C. 559, 142 S.E. 2d 177 (1965). The facts in *Hall* were briefly as follows: Defendant was in jail and officers both from North Carolina and Virginia knew this. They did not request defendant's permission to search his home but went to the home, confronted defendant's wife, identified themselves as police officers, and asked for the privilege of searching the house. There was some question as to the extent the officers left the wife free to consent to the search, or whether the number of officers had a coercive effect sufficient to make her consent involuntary. A search of the house by the officers turned up a clock and a radio which were later identified as belonging to the store in Edenton, North Carolina, which had been robbed. The officers then confronted the defendant with these items, at which time he confessed to the breaking and entering and larceny. This Court held that the possession of the radio and clock was unlawfully obtained by the officers and were improperly admitted in evidence. The facts in the present case clearly distinguish it from *Hall*.

Here, there were but two officers who talked to Mrs. Woods at the police station in the presence of her mother. Mrs. Woods was asked about the rings and was persuaded by her mother to give the rings to the officers. She thereafter took her mother and the officers to her trailer-home where she unlocked the door and led the two officers and her mother to her bedroom where she picked up a pair of her blue jean pants and took from the right side pocket of these pants the two rings in question and gave them to the officers. No search or further inquiry was made at the trailer. The officers were inside the trailer less than two minutes. The rings given to the officers by Mrs. Woods had been given to her by her husband on 11 August 1973. The rings were hers and were in her possession.

It is well settled that evidence obtained by unreasonable searches and seizures is inadmissible. Fourth, Fifth and Fourteenth Amendments to the United States Constitution; Article I, Section 20, of the North Carolina Constitution; G.S. 15-27 (repealed effective July 1, 1975, by Chapter 1286, Section 26, 1973 Session Laws); *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961); *State v. Reams*, 277 N.C. 391, 178 S.E. 2d 65 (1970); *State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376 (1968). It is also well settled that the constitutional guaranty against unreasonable searches and seizures does not pro-

hibit a seizure of evidence without a warrant where no search is required. *U. S.* v. *Pate*, 324 F. 2d 934 (7th Cir. 1963), *cert. den.* 377 U.S. 937, 12 L.Ed. 2d 299, 84 S.Ct. 1341 (1964); *State* v. *Reams*, *supra*, *State* v. *Virgil*, 276 N.C. 217, 172 S.E. 2d 28 (1970).

Quoting with approval from *State* v. *Coolidge*, 106 N.H. 186, 208 A. 2d 322, this Court in *Reams*, *supra*, at 398, 178 S.E. 2d at 69, stated:

> "'A search ordinarily implies a quest by an officer of the law, a prying into hidden places for that which is concealed. A seizure contemplates forcible dispossession of the owner. *Weeks* v. *United States*, 232 U.S. 383, 397, 34 S.Ct. 341, 58 L.Ed. 652; *United States ex rel Stacey* v. *Pate*, 324 F. 2d 934, 935 (7th Cir. 1963); [other citations omitted.]'"

The evidence in the instant case amply supports the trial judge's findings of fact:

> "That Mrs. Woods had a legal right to enter the trailer premises on the occasion when she did so with her mother and the officers. That the officers performed no search on the premises.
>
> "That the interrogation was not extensive in duration. That Mrs. Woods was not coerced by the officers into producing the rings and in fact made no effort to do so until requested by her mother to cooperate with the officers. That she was under no duress, restraint or coercion at the time she agreed to go to the trailer."

These facts sustained the trial judge's conclusions of law that "there was no unreasonable search of the premises occupied by the defendant and his wife at the time the rings were obtained, and second, that the rings were legally obtained from Mrs. Woods who voluntarily, knowingly, understandingly and intentionally turned over their possession to the officers."

We hold, therefore, that no search was involved, and that Mrs. Woods voluntarily turned the rings over to the officers. They were properly admitted into evidence.

This assignment of error is overruled.

[3] Defendant next contends that his rights under the Fourth Amendment to the Constitution of the United States, as applied

to the states by the Fourteenth Amendment, were violated by the unreasonable search and seizure of the automobile in question.

In the instant case, as defendant and his wife were driving their car they were stopped by police officers who took defendant to police headquarters for questioning. The officers had no arrest warrant and no search warrant.

While defendant was being taken to police headquarters, the 1967 Chevrolet and his wife were driven by an officer to headquarters also. Once there, the car was impounded and thereafter a search warrant for the car was issued and served on the defendant and on his wife before any search of it was made.

Defendant contends that the officers had no reasonable grounds for a warrantless arrest and, since he was not arrested when he was taken in for questioning, the seizure of the automobile at that time without a search warrant was unconstitutional and that all evidence seized from the car and all testimony which referred to the evidence found in the car should have been suppressed.

It is not necessary to decide whether defendant was arrested at the time he was requested by the officers to accompany them to the police station to answer questions. The officers then had probable cause to believe that defendant had committed three serious felonies—kidnapping, rape, and murder—and was likely to evade arrest if not immediately taken into custody. An arrest then would have been proper. G.S. 15-41 (repealed effective July 1, 1975, by Chapter 1286, Section 26, 1973 Session Laws).

While he was at the police station, defendant was formally arrested and proper warrants charging the three felonies were served on him. The car was impounded and was not searched until a search warrant was procured and served. Defendant contends, however, that the original seizure of the automobile was unreasonable and without a warrant and that any evidence obtained therefrom was inadmissible. Unreasonable searches and seizures are prohibited by both the Constitution of the United States and the Constitution of North Carolina, and all evidence obtained by searches and seizures in violation of the Constitution is inadmissible in both state and federal courts. *State* v. *Allen*, 282 N.C. 503, 194 S.E. 2d 9 (1973); *State* v. *Ratliff*, 281 N.C. 397, 189 S.E. 2d 179 (1972); *State* v. *Hill*, 278 N.C. 365, 180

S.E. 2d 21 (1971); G.S. 15-27 (repealed effective July 1, 1975, by Chapter 1286, Section 26, 1973 Session Laws).

A warrantless search of a vehicle capable of movement may be made by officers when they have probable cause to search and if exigent circumstances make it impractical to secure a search warrant. *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419 (1970); *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed. 2d 685 (1969); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925); *State v. Allen, supra; State v. Ratliff, supra; State v. Jordan*, 277 N.C. 341, 177 S.E. 2d 289 (1970).

In the instant case there was sufficient evidence to constitute probable cause that the 1967 Chevrolet driven by defendant and taken to the police station had been involved in the kidnapping, rape, and murder of the deceased. Later in the day, this evidence was sufficient to cause a magistrate to issue a search warrant for the car. The officers who seized the automobile were faced with two dilemmas. First, if the automobile was not seized and impounded, the wife of the defendant would likely attempt to destroy or make unusable any evidence therein. This assumption was based on evidence that she had already disposed of the victim's class ring. The second was that unless the automobile was impounded and safeguarded any evidence in the car could be tainted and considered unreliable in the minds of the jury and perhaps even made inadmissible because of intervening uncontrolled access to the car by persons other than defendant. In *Chambers v. Maroney, supra*, at 51-52, 26 L.Ed. 2d at 428, 90 S.Ct. at 1921, Justice White, in upholding the search of a car, speaking for the United States Supreme Court, stated:

> "Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the 'lesser' intrusion is permissible until the magistrate authorizes the 'greater'. But which is the 'greater' and which the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment."

We hold that the officers in this case had probable cause to seize and hold the car before presenting the probable cause issue to a magistrate and obtaining a valid search warrant.

This assignment is overruled.

[4] By his Assignment of Error No. 13, defendant asserts that the trial court erred when it allowed the introduction of staged photographs into evidence even though the testimony revealed that the photographs were staged with witnesses and with the automobiles of the alleged victim and of the defendant.

Defendant correctly concedes that a photograph of a person, place or object may be introduced into evidence to illustrate the testimony of a witness. *State v. Johnson*, 280 N.C. 281, 185 S.E. 2d 698 (1972); 1 Stansbury's N. C. Evidence, § 34, p. 93 (Brandis Rev. (1973)). The photographs of the parking lot on which the alleged abduction took place were made on 22 August 1973, some eleven days after the incident allegedly occurred. They were made by witness Henry M. Dula, employer of the deceased, at the direction and under the supervision of the Lenoir Police Department. Photographs of this area included photographs of the parking lot, of the automobile driven by the deceased, of the alley leading to the parking lot, of the witness Cline in the alley, and in other places. The photographs also showed the defendant's car on the parking lot with the deceased's car. The defendant contends that one of the errors in posing the 1967 Chevrolet is that the photograph clearly shows its license number (BMW-522).

For a photograph to be used to illustrate the testimony of a witness it must be identified as portraying the scene with sufficient accuracy but need not have been made by the witness himself provided he can testify as to its adequacy as a representation. 1 Stansbury's, *Supra*, § 34, pp. 93-95. Stansbury also points out that "[p]osed photographs of the reconstructed scene of an accident are admissible when properly identified by a witness as being accurate representations of the conditions as he saw them at the time in issue." 1 Stanbury's, *supra*, § 34, p. 97; *Hunt v. Wooten*, 238 N.C. 42, 76 S.E. 2d 326 (1953); *State v. Matthews*, 191 N.C. 378, 131 S.E. 743 (1926).

At the time the photographs were introduced into evidence and again in his charge, the trial court instructed the jury that the photographs were introduced "for the sole purpose of illustrating or explaining the testimony of the witnesses. These photo-

graphs . . . may not be considered by you for any other purpose." In addition, the photographs where staged were described to the jury as posed or staged photographs, designed to illustrate the testimony of the witnesses as to the type, style, color characteristics of the vehicles observed and their relative positions and the relative positions of the various witnesses in the parking lot. There could be no misunderstanding that the photographs were posed or staged.

Captain Triplett of the Lenoir Police Department testified as to the license number (BMW-522) of the 1967 Chevrolet which defendant had been driving prior to the alleged crimes and which had been legally impounded by the officers. The jury was informed that the photographs were made by a professional photographer after the alleged kidnapping and that they were offered for the limited purpose of illustrating the testimony of the witness. "Photographs are admissible in this State to illustrate the testimony of a witness, and their admission for that purpose under proper limiting instructions is not error." *State v. Crowder*, 285 N.C. 42, 203 S.E. 2d 38 (1974). *State v. Duncan*, 282 N.C. 412, 193 S.E. 2d 65 (1972); *State v. Cutshall*, 278 N.C. 334, 180 S.E. 2d 745 (1971). *See generally*, 1 Stansbury's *supra*, § 34.

We hold that for the limited purpose of illustrating the testimony of witnesses, the posed or staged photographs were properly admitted into evidence. This assignment is overruled.

[5] By his Assignment of Error No. 12, defendant alleges that the trial court erred in allowing witnesses to make in-court identifications of the defendant when those identifications were tainted by the police having shown these witnesses police photographs of the defendant which impermissibly suggested to the witnesses that the defendant was in fact guilty of the crimes for which he was charged.

Defendant contends that each of the witnesses who identified the defendant in open court had previously been shown a group of police photographs or mug shots and that these photographs showed a frontal view, right profile and left profile of each of the persons photographed. Defendant particularly contends that the witness Cline had less than one minute to observe the side of the defendant's face, that he had never seen the defendant prior to 11 August 1973, and that his in-court identification was inadmissible.

In *Simmons v. United States*, 390 U.S. 377, 384, 19 L.Ed. 2d 1247, 1253, 88 S.Ct. 967, 971 (1968), the court held that "each case must be considered on its own facts, and . . . convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside . . . only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. . . . "

In each instance when the identification of defendant by a witness was questioned, the trial court held an extensive *voir dire* hearing. After two of these hearings, the court held that the testimony of the witness in question regarding the identification of defendant was not admissible. In the others, he held the identification testimony admissible. In each instance he found facts and made conclusions of law. Defendant strenuously objected to the identification of defendant and the deceased by the witness Cline. We quote some of the findings of fact made by the trial court and his conclusions of law as to this witness.

"FINDINGS OF FACT

* * *

"That it was daylight. That there was nothing obscuring the vision of the witness, Cline, of either of these parties and that he observed the right and a portion of the front of the faces of the individuals whom he described.

* * *

"That he was within twenty to thirty feet of the couple that he observed and never at any time attended a lineup in which the defendant was placed or observed the defendant in a lineup.

* * *

"That the witness had ample opportunity to observe the side and a portion of the front of the faces of both parties present on the parking lot on the morning of August 11, 1973, and observed them from the time he emerged from the alley, crossed the street and turned to the jewelry store.

"That the identity [sic] by the witness, Cline, of the defendant and Paula Gail Hollar was based upon his observation of these two persons at the time he saw them in the parking lot near the jewelry store and the independent

recollection of what he saw on that occasion and not the photographs of the defendant which were displayed to him by the officers at the police station or upon the photograph of Paula Gail Hollar which he saw lying on the desk at the time or at some later time.

"That the witness's identification of the defendant and Paula Gail Hollar was of independent origin and did not originate in the police station of the town of Lenoir.

"CONCLUSIONS OF LAW

"Based upon the foregoing Findings of Fact, the court concludes as a matter of law that the pre-trial identification procedure of displaying the photograph was not unnecessarily suggestive and conducive to irreparable mistaken identification and the court finds the evidence totally void of anything to suggest that the procedures as followed would manifestly offend fundamental standards of decency, fairness and justice and amount to denial of due process of law. Next, that there is no substantial likelihood of irreparable misidentification.

"Based upon the foregoing Findings of Fact and Conclusions of Law it is the order of the court that this witness be permitted, in open court, to identify this defendant."

In *State v. Tuggle*, 284 N.C. 515, 520, 201 S.E. 2d 884, 887 (1974), Chief Justice Bobbitt stated the rules governing *voir dire* hearings when identification testimony is challenged:

"When the admissibility of in-court identification testimony is challenged on the ground it is tainted by out-of-court identification(s) made under constitutionally impermissible circumstances, the trial judge must make findings as to the background facts to determine whether the proffered testimony meets the tests of admissibility. When the facts so found are supported by competent evidence, they are conclusive on appellate courts. *State v. McVay* and *State v. Simmons*, 277 N.C. 410, 417, 177 S.E. 2d 874, 878 (1970); *State v. McVay* and *State v. Simmons*, 279 N.C. 428, 432, 183 S.E. 2d 652, 655 (1971); *State v. Morris*, 279 N.C. 477, 481, 183 S.E. 2d 634, 637 (1971)."

Accord, State v. Henderson, 285 N.C. 1, 203 S.E. 2d 10 (1974); *State v. Shore*, 285 N.C. 328, 204 S.E. 2d 682 (1974). *See*, 1 Stansbury's, *supra*, § 57, pp. 176-77.

In the present case the facts found by the trial court after *voir dire* hearings concerning each witness allowed to identify defendant were substantially as set out above for the witness Cline, were supported by competent evidence and are conclusive on this Court.

This assignment is overruled.

[6] Defendant next assigns as error the admission of testimony of a witness who was unable to identify with certainty an automobile or its occupants.

The witness Wilcox testified that she saw a light-green Chevrolet with two passengers turn onto Old Mill Creek Road at approximately 10:20 a.m. on Saturday, 11 August 1973. She testified that she thought the car was a light-green 1967 Chevrolet although she was uncertain of the color of the top. She thought the driver was a male but was unsure about the passenger. She noticed nothing unusual about the way the passengers were seated.

Defendant contends that this testimony was highly prejudicial to defendant for it seeks to put the light-green car that defendant had been driving near the location where the body of deceased was found without any evidence as to who was driving the car at the time.

Chief Justice Denny, in *State v. Hamilton*, 264 N.C. 277, 286-87, 141 S.E. 2d 506, 513 (1965), a case in which as here the State relied on circumstantial evidence, stated: " . . . However, in criminal cases, every circumstance that is calculated to throw any light upon the supposed crime is admissible. The weight of such evidence is for the jury." *Accord, State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973); *State v. Shaw*, 284 N.C. 366, 200 S.E. 2d 585 (1973); *State v. Sneeden*, 274 N.C. 498, 164 S.E. 2d 190 (1968).

The testimony of the witness Wilcox was relevant in that it placed a male driver in a light-green Chevrolet operating the vehicle on the wrong side of the road on Hibriten Drive turning onto the Old Mill Creek Road at approximately 10:20 a.m. on the morning of 11 August 1973. This was near where the body of deceased was found the next day.

This is a circumstance to be considered by the jury. The weight is for the jury. This assignment is overruled.

[7] Defendant next assigns as error the failure of the trial court to charge on defendant's evidence relating to alibi.

Defendant's sister, Barbara Minton, testified that defendant was at her house on 11 August 1973 from 7:00 a.m. to 7:40 a.m. and later that same morning stayed from 10:00 a.m. until 10:15 a.m.

Louise Wilcox testified for the State that she saw two people drive onto Old Mill Creek Road at about 10:20 a.m. that same morning.

This is the only evidence cited by defendant of an alibi.

Although it is doubtful if this evidence is sufficient to require the court to charge on alibi even if requested to do so, no such request was made in this case.

In *State v. Hunt*, 283 N.C. 617, 197 S.E. 2d 513 (1973), we established the rule in this jurisdiction that the court is not required to give an instruction on alibi unless requested to do so by the defendant.

In *State v. Shore*, 285 N.C. 328, 341, 204 S.E. 2d 682, 690 (1974), Justice Huskins, speaking for the Court, said:

> "Prior to decision of this Court in *State v. Hunt*, 283 N.C. 617, 197 S.E. 2d 513 (filed 12 July 1973), a defendant who offered alibi evidence was entitled to such instruction without specifically requesting it. *State v. Vance*, 277 N.C. 345, 177 S.E. 2d 389 (1970); *State v. Leach*, 263 N.C. 242, 139 S.E. 2d 257 (1964); *State v. Gammons*, 258 N.C. 522, 128 S.E. 2d 860 (1963); *State v. Spencer*, 256 N.C. 487, 124 S.E. 2d 175 (1962).
>
> "In *State v. Hunt, supra*, we held 'that reason and authority support a different rule, namely, that the court *is not required* to give such an instruction unless it is requested by the defendant. Hence, the cited decisions, in respect of the rule stated above, are overruled. The rule stated herein will be applicable in trials commenced after the filing of this opinion. . . .' The opinion in *Hunt* was filed 12 July 1973. . . ."

The trial of the present case began on 21 January 1974. In the absence of a request for instruction on the evidence of an alibi, no such instruction was required. This assignment is overruled.

[8] By his Assignment of Error No. 20, defendant contends the trial court erred in failing to submit to the jury the question of defendant's guilt of second degree murder as a lesser included offense under the first degree murder indictment.

On 11 August 1973, G.S. 14-17 in part provided:

> "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. . . ."

The trial judge, after defining "kidnapping" and "rape," charged the jury:

> "So, I instruct you, members of the jury, that if you find from the evidence and beyond a reasonable doubt that on or about the 11th day of August, 1973, Vernon Junior Woods struck Paula Gail Hollar on the head with a blunt instrument . . . while committing, or attempting to commit the crime of kidnapping or rape, and that these blows . . . proximately caused Paula Gail Hollar's death, it would be your duty to return a verdict of Guilty of Murder in the First Degree. However, if you do not so find, or have a reasonable doubt as to one or more of these things it would be your duty to return a verdict of Not Guilty."

The judge did not instruct regarding proof of murder in the first degree by killing with premeditation and deliberation or regarding second degree murder.

When all the evidence tends to show that the accused killed the deceased in the perpetration or attempted perpetration of a felony and there is no evidence of guilt of a lesser offense, the court correctly refrains from submitting the question of defendant's guilt of murder in the second degree. *State v. Hairston* and *State v. Howard* and *State v. McIntyre*, 280 N.C. 220, 185 S.E. 2d 633 (1972); *State v. Doss*, 279 N.C. 413, 183 S.E.

2d 671 (1971); *State v. Crawford*, 260 N.C. 548, 133 S.E. 2d 232 (1963); *State v. Scales*, 242 N.C. 400, 87 S.E. 2d 916 (1955); *State v. Mays*, 225 N.C. 486, 35 S.E. 2d 494 (1945). In the present case, the State's evidence (consisting of over 300 pages in the record) tended to show that Paula Gail Hollar was kidnapped by defendant on the streets of Lenoir, forced into his automobile, driven to a secluded area off Hibriten Drive, raped, and murdered. Defendant's evidence sought to show that Mrs. Hollar had not been raped, that she had not been kidnapped, and that in any event defendant was not the perpetrator of the crimes. The jury was instructed that if they believed deceased was killed but did not believe that this occurred during the perpetration of rape or kidnapping by defendant, they were to return a verdict of "not guilty." We find no evidenec in the 516-page record of this case that suggests deceased was killed other than in the perpetration or attempted perpetration of the felonies of kidnapping and rape. We hold therefore that the trial judge did not err in failing to instruct the jury on the question of defendant's guilt of the lesser included offense of second degree murder.

By Assignments of Error Nos. 18 and 19, defendant contends the trial court erred in overruling his motions for directed verdicts of not guilty and motion to set aside the verdicts.

The motion for a directed verdict of not guilty challenges the sufficiency of the evidence to go to the jury. *State v. Wiley*, 242 N.C. 114, 86 S.E. 2d 913 (1955); *State v. Brackville*, 106 N.C. 701, 11 S.E. 284 (1890). "When the evidence is sufficient to overrule defendant's motions for nonsuit, the evidence is also sufficient to overrule defendant's motion for a directed verdict of not guilty, since the motions have the same legal effect." 2 Strong, N. C. Index 2d, Criminal Law § 109 (1974 Supp.); *State v. Glover*, 270 N.C. 319, 154 S.E. 2d 305 (1967). On motion to nonsuit, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *See*, 2 Strong, N. C. Index 2d, Criminal Law § 104 (1967), and numerous cases therein cited. Contradictions and discrepancies are for the jury to resolve, and do not warrant nonsuit. *Id.* Only the evidence favorable to the State will be considered, and defendant's evidence relating to matters of defense will not be considered. *Id.*

[9] The State's case is based upon circumstantial evidence. The State offered numerous witnesses whose testimony tended

to show that the defendant was in downtown Lenoir around 9:00 a.m. on 11 August 1973 driving a 1967 light-green Chevrolet with a dark top. Several women testified that they were approached by defendant on this morning. There was testimony that a man and women were seen scuffling in the parking lot where deceased's car was parked and that deceased was shoved into defendant's car. A car like defendant's carrying two occupants and with a male driver was seen about an hour and twenty minutes later on the wrong side of Hibriten Drive and the car turned into Old Mill Creek Road. The victim's body was found in a stream nearby late the next day. The victim had live spermatozoa in her vagina, her vagina and rectal area had been injured and there was a tear in the peritoneum. Rings identified as belonging to the victim were given by the defendant to his wife on the afternoon of 11 August. A torn portion of an insurance identification card was found in the 1967 Chevrolet operated by defendant, and this torn portion matched the other portion of the card found with the personal effects of the deceased. Fibers found in the 1967 Chevrolet matched fibers from the dress worn by the deceased on August 11.

The State's evidence in this case was clearly adequate to survive defendant's motion for directed verdict and the case was properly submitted to the jury. This assignment is overruled.

[10] Defendant next contends that the trial court erred in overruling his motion to arrest the judgments entered in the kidnapping and rape cases. We agree.

The trial judge instructed the jury that in order to find defendant guilty, they must find that defendant caused the death of deceased while committing or attempting to commit the crimes of rape or kidnapping. It is clear from this instruction that proof of rape or kidnapping was an indispensable element in the State's proof of murder in the first degree. This being true, neither rape nor kidnapping affords basis for additional punishment under the merger rule, most recently discussed in *State v. McLaughlin*, 286 N.C. , S.E. 2d (1975). *See also, State v. Moore*, 284 N.C. 485, 202 S.E. 2d 169 (1974); *State v. Carroll*, 282 N.C. 326, 193 S.E. 2d 85 (1972); *State v. Peele*, 281 N.C. 253, 188 S.E. 2d 326 (1972); *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972). This assignment is sustained and the judgments in the kidnapping and rape cases are arrested.

By Assignment of Error No. 9, defendant contends it was prejudicial error to allow Laura Ward, an expert in forensic serology employed by the State Bureau of Investigation Chemical Laboratory, to testify as to the presence of human blood on the seat cover of the 1967 Chevrolet automobile allegedly driven by defendant on 11 August 1973.

At trial, Laura Ward testified that her examination of the seat cover revealed a bloodstain approximately two inches in diameter. The quantity was sufficient to allow her to determine the blood to be of human origin, but insufficient to allow her to determine the blood type. She further testified that the blood was diluted by some substance, but could not determine what that substance was. She could not tell how long the blood had been on the seat cover—whether one or two weeks. Defendant moved to strike this testimony as being of no probative value, which motion was denied by the trial court.

In 1 Stansbury's, *supra*, § 78, we find:

> "The standard of admissibility based on relevancy and materiality is of necessity so elastic, and the variety of possible fact situations so nearly infinite, that an exact rule cannot be formulated. In attempting to express the standard more precisely, the Court has emphasized the necessity of a *reasonable*, or *open and visible* connection, rather than one which is remote, latent, or conjectural, between the evidence presented and the fact to be proved by it . . . ."

And this Court has said that "'. . . in criminal cases, every circumstance that is calculated to throw any light upon the supposed crime is admissible.'" *State v. Hamilton*, *supra*. *Accord*, *State v. Arnold*, *supra*; *State v. Shaw*, *supra*.

Prior to the testimony of Laura Ward, the State offered evidence tending to show that deceased had been forced into an automobile like that driven by defendant on 11 August, and that the deceased suffered abrasions and traumas to various parts of her anatomy before her death. The State also introduced evidence tending to show that a portion of deceased's insurance identification card was found in the 1967 Chevrolet belonging to defendant. Subsequent to the testimony of Laura Ward, the State offered evidence tending to show that fibers from the seat cover of the 1967 Chevrolet matched fibers from the clothing worn by deceased on the day of her death.

To be admissible, an item of evidence need only have a logical tendency to prove a fact in issue, and need not *prove* a material fact *of itself*. As is said in McCormick on Evidence 436 (2d ed. 1972):

> " . . . Items are normally offered and admitted or rejected as units, though of course the judge will consider any proof already made by the proponent as indicating the bearing of the item offered, and may in his discretion ask the proponent what additional circumstances he expects to prove. But when it is offered and judged singly and in isolation, as it frequently is, it cannot be expected by itself to furnish conclusive proof of the ultimate fact to be inferred. . . . This is the distinction between relevancy and sufficiency. The test of relevancy, which is to be applied by the trial judge in determining whether a *particular item or group of items of evidence* is to be admitted is a different and less stringent one than the standard used at a later stage in deciding whether *all the evidence* of the party on an issue is sufficient to permit the issue to go to the jury. A brick is not a wall." (Emphasis added.)

See also, 1 Stansbury's, *supra*, § 78, p. 238.

[11] When considered with other circumstances shown by the evidence, we think the fact that there was a human bloodstain on the seat cover of the automobile alleged to have been utilized in the kidnapping of deceased and driven by defendant on the morning of 11 August 1973 is highly probative of a material fact in this case and was properly admitted in evidence. The fact that the State could not show the blood type went to the weight of the evidence and not to its admissibility. This assignment is overruled.

[12] Defendant next contends that the court erred when it allowed witness W. E. Pearce to testify regarding matters within his common experience and not based on expert tests conducted by him.

Mr. Pearce, a forensic chemist for the State Bureau of Investigation Chemical Laboratory, testified at length concerning his examination of fibers from the victim's dress, his examination of fibers seized in the search of the 1967 Chevrolet, and his expert opinion as to similarity of the fibers. Mr. Pearce used microscopic examination, solvent tests and thin-layer chroma-

tography in reaching the conclusion that the fibers found in the automobile could have come from the victim's dress. He testified that it was "unlikely" that these fibers came from a different article dyed in the same manner as the dress.

On cross-examination, Pearce testified that he had some distinct impressions as to how common the various fibers were. He said the cotton fiber was fairly common but that the red polyester fiber was "quite unique unto itself" and "reasonably rare" due to the fact that it was dyed by a mixture of several different dyes rather than by one of the approximately thirty dyes most commonly used. He stated that it was therefore "unlikely" that these fibers came from a source other than the victim's dress. He concluded that he did not know exactly what quantity polyester fiber was colored with the same mixture of dyes or how much of this fiber was distributed in the Lenoir area, and that he therefore could not determine to exact probability whether the fibers found in the automobile were from a source other than the victim's dress, but that it was "unlikely" since he knew that " . . . just going through life . . .you don't routinely see two women with the same dress on. It does happen, but it is not extremely common. You . . . go to a clothing store and . . . see duplications, but they are not the rule."

It is the rule in North Carolina that "[a] finding by the trial judge that the witness possesses the requisite skill will not be reversed on appeal unless there is no evidence to support it or the judge abuses his discretion." 1 Stansbury's, *supra*, § 133. *State v. Johnson*, 280 N.C. 281, 185 S.E. 2d 698 (1972); *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971); *Hunt v. Wooten*, 238 N.C. 42, 76 S.E. 2d 326 (1953). In this case, the trial judge found Mr. Pearce to be an expert and there is ample evidence to support this finding. It is clear that the witness's statements to the effect that the red polyester fibers were "reasonably rare" and that it was "unlikely" that the fibers came from a source other than the dress of the victim were based on his expertise. He evidenced a professional familiarity with dyes and dyeing techniques, and knew which dyes were more common than others. We think the further statement by the witness on cross-examination that it was also unlikely that two women might on the same dress was inconsequential in this setting. Clothing merchandising was not this expert's area of expertise, as the witness pointed out when he said his answer was based on "just going through life." Defendant, having asked the

questions, cannot now be heard to say the court erred in allowing seemingly innocuous answers. This assignment is overruled.

[13] Defendant next assigns as error the trial court's denial of his motions to quash the bills of indictment for the reason that the felony-murder doctrine under which the State elected to proceed is unconstitutionally vague in that kidnapping was not listed in G.S. 14-17 at the time of the offense as one of the felonies that would support a conviction under the felony-murder rule.

Suffice to say that, prior to the amending of G.S. 14-17 to add kidnapping to the list of specified felonies (1973 Session Laws, Chapter 1201, Section 1, effective 8 April 1974), it was well established that any felony inherently dangerous to life is within the purview of G.S. 14-17 though not specified therein. *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972); *State v. Rich*, 277 N.C. 333, 177 S.E. 2d 422 (1970); *State v. Streeton*, 231 N.C. 301, 56 S.E. 2d 649 (1949). We held in *State v. Streeton, supra*, that a homicide in the perpetration of kidnapping is first degree murder, Justice Ervin stating that "[w]hen a person undertakes by force or violence to kidnap another . . . contrary to G.S. 14-39, he commits or attempts to commit a felony which has a natural tendency to cause death."

Rape was listed in G.S. 14-17 at the time of the alleged murder as one of the felonies that would support a conviction under the felony-murder rule. Either kidnapping or rape would support a conviction under this rule.

There is no merit to this assignment.

[14] Defendant finally contends that his rights under the Eighth and Fourteenth Amendments to the United States Constitution were violated in this case by the imposition of the mandatory death sentence. Defendant contends specifically that due to the large amount of discretion present in the administration of criminal justice, particularly the discretion vested in the district attorney in determining which cases will be prosecuted for the capital crime, or which should be prosecuted for a lesser offense, the imposition of the death penalty is cruel and unusual punishment and operated to deprive him of his rights of equal protection of the law. Defendant's contentions were extensively argued, carefully considered and rejected in *State v. Jarrette*, 284 N.C. 625, 202 S.E. 2d 721 (1974). We adhere to our deci-

sion in that case. *See also, State v. Fowler*, 285 N.C. 90, 203 S.E. 2d 803 (1974); *State v. Dillard*, 285 N.C. 72, 203 S.E. 2d 6 (1974); *State v. Crowder*, 285 N.C. 42, 203 S.E. 2d 38 (1974); *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19 (1973).

Because of the imposition of the death sentence, we have carefully examined the entire record in this case and each assignment of error brought forward by defendant. Our examination discloses that defendant received a fair trial free from prejudicial error.

As to the murder charges: No error.

As to the kidnapping and rape charges: Judgments arrested.

Chief Justice SHARP dissents as to the death sentence and votes to remand for the imposition of life imprisonment for the reasons stated in her dissenting opinion in *State v. McLaughlin*, 286 N.C. 597, ___ S.E. 2d ___ (1975).

Justice COPELAND dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in *State v. Williams*, 286 N.C. 422 at 437, 212 S.E. 2d 113 (1975).

Justice EXUM dissents from that portion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be imposed for the reasons stated in his dissenting opinion in *State v. Williams*, 286 N.C. 422, 212 S.E. 2d 113 (1975), other than those relating to the effect of Section 3 of Chapter 1201 of the 1973 Session Laws.

STATE OF NORTH CAROLINA v. JOHN RICHARD STEG[illegible]